No. 87-769

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In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN OLAQUES, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 4

United States v. *LTV Corp.*, 746 F.2d 51 (D.C. Cir. 1984) 4

Regulation:

17 C.F.R. 240.10b-5 (SEC Rule 10b-5) 4

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Petitioner contends that the court of appeals erred in holding that he lacks standing to challenge the settlement of an insider trading case to which he was not a party.

1. In October 1981, the Securities and Exchange Commission (SEC) filed an enforcement action in the United States District Court for the Southern District of New York alleging that, between September 21, 1981, and October 1, 1981 ("the window period"), certain unidentified individuals had purchased common stock of Santa Fe International Corporation (Santa Fe) and call options for that stock while in possession of material non-public information concerning an anticipated merger between Santa Fe and Kuwait Petroleum Company. The complaint sought injunctive relief against future violations of the securities laws and disgorgement of illegal profits obtained during the window period. On October 26, 1981, the dis-

trict court entered a temporary restraining order freezing all proceeds subject to disgorgement. The court subsequently entered a preliminary injunction, thereby continuing the freeze until the case was settled. Pet. App. 4b.

While the SEC's suit was pending, two groups of private investors brought civil actions to recover damages based on defendants' illegal trading in Santa Fe securities. After the individual defendants were identified, a settlement of the claims was negotiated, including the claims of the two investor groups. Under the settlement, the defendants agreed to disgorge profits of $7.8 million. The settlement included a plan of distribution under which two claims funds were established to compensate persons who had traded in Santa Fe options or common stock during the window period and were injured by defendants' trading. One fund—to which a total of $4.5 million was allocated—was for persons who had suffered out-of-pocket losses while trading in Santa Fe options. The other fund—to which approximately $495,000 was allocated—was for persons who had suffered out-of-pocket losses as a result of trading in Santa Fe common stock. Also as part of the settlement, a payment of $2.85 million was to be made to the two investor groups in settlement of their separate suits. Pet. App. 4b-6b.

On February 26, 1986, the district court entered an order finding that "the terms and conditions proposed by the parties to establish a claims fund and claims procedure are a good faith, fair and reasonable proposal" (Pet. App. 2d). In its order, the court appointed a master to oversee the distribution of the claims funds and to notify the claimants of the claims procedure. The court also scheduled a hearing for June 13, 1986, to consider objections to the proposed settlement raised by any claimant. Pet. App. 5b-6b, 9d-10d, 23d.

Petitioner subsequently filed written objections and appeared at the June 13th hearing. Although he had not

traded in Santa Fe options or stock during the window period,[1] he maintained that he was nonetheless entitled to file a claim. Specifically, he contended that the proposed settlement should be modified to permit claims, such as his, based on options transactions *before* the window period (C.A. App. 200, 249-250). The district court rejected petitioner's argument and denied his motion to intervene as a party (Pet. App. 9b). The court reasoned that because petitioner did not trade in Santa Fe options during the period at issue in the complaint, his injury was not caused by defendants' trading during that period but rather by "the fact that a merger was announced" (C.A. App. 253).

2. The court of appeals affirmed the denial of intervention and dismissed petitioner's appeal for lack of standing (Pet. App. 8b-9b). In its view, "[b]ecause [petitioner] was not induced by persons acting on inside information to purchase or sell securities during [the relevant] period, he has no claim under Rule 10b-5 to the settlement fund and no 'significantly protectable interest' in the litigation that might be impaired by the disposition of this case" (Pet. App. 9b (citation omitted)).

3. The court of appeals correctly concluded that petitioner lacks standing to challenge the settlement agreement. Petitioner was not a party to the proceedings, and as the court of appeals noted (Pet. App. 9b (citing authority)), nonparties generally lack standing to appeal. The fact that the SEC submitted the plan of distribution

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[1] The complaint alleged that defendants' stock purchases occurred between September 21 and September 23, 1981, and that their options purchases occurred between September 22 and October 1, 1981 (C.A. App. 26-29, 31). Petitioner alleges (Pet. 16) that between August 11, 1981, and September 21, 1981, he wrote a large number of call option contracts, which remained open until October 6, 1981 (the day after the inside information became public (see Pet. App. 4b)), and that he sustained a loss of $500,000.

for court approval and invited comments by potential claimants did not alter petitioner's status as a nonparty. See, *e.g.*, *United States* v. *LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984). And since petitioner was not a party to the private actions settled simultaneously with the SEC suit, and was not bound by the judgments in those actions, he was not entitled to be heard concerning the settlement of those actions.

Nor is there any reason why, notwithstanding his status as a nonparty, petitioner should be allowed to challenge the settlement agreement. Petitioner views the window period as an arbitrary time period, and he submits that he was injured by defendants' conduct (Pet. 16). In fact, the window period was the only interval at issue in the SEC's complaint. As the district court observed, since petitioner did not trade in Santa Fe options during the relevant period (see note 1, *supra*), his injury was not caused by the insider trading alleged in the complaint (C.A. App. 253).[2]

If petitioner believed that he was injured by defendants' actions, he was free to file his own civil suit. The fact that he chose not to do so does not entitle him to challenge the settlement agreement involved here. As the court of appeals noted (Pet. App. 10b), petitioner "should not expect to be able to stand aside and watch others incur the expenses of lengthy litigation and then upset the results of those efforts."

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[2] Petitioner errs in asserting (Pet. 6) that the present decision "flies in the face of" this Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). In *Blue Chip*, the Court held that offerees of a stock offering, who had neither purchased nor sold any of the offered shares, were not entitled to maintain a private damages action under SEC Rule 10b-5. Petitioner's argument appears to be that, conversely, anyone who ever *did* sell Santa Fe options has standing to assert a claim, even in someone else's lawsuit asserting violations at a different time period. *Blue Chip* says no such thing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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